Office-Supreme Court, U.S.
FILED
JUL 25 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. [redacted] 127

OCTOBER TERM, 1963.

WORTH MUNN, *et al.*,

Petitioners,

v.

THE HORVITZ COMPANY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari To the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

No. 1159.
OCTOBER TERM, 1963.

WORTH MUNN, *et al.*,
Petitioners,

v.

THE HORVITZ COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari To the Supreme Court of the State of Ohio.

JURISDICTION.

Certiorari should be denied for the reason that the decision of the Supreme Court of Ohio was based on laches and additional adequate and independent non-federal grounds. Questions of eminent domain are not involved.

QUESTIONS PRESENTED.

(1) Is a delay of two years in seeking injunctive relief a sufficient basis for a court to find petitioners guilty of laches?

(2) Does an upper landowner have the right to collect surface water within a watershed and drain it into a natural watercourse passing through his land without incurring liability to lower riparian owners?

(3) May the right to divert surface water from one watershed into the natural watercourse of another be acquired by the open and adverse diversion of such sur-

face water for a time in excess of the prescriptive period of twenty-one years?

STATEMENT OF THE CASE.

The issues in this case concern the failure of petitioners to seek timely relief, and respondents' right to drain surface water from an area by means of storm sewers emptying into a natural watercourse called Deer Creek which originates in Mayfield Heights, Ohio and flows through the lands of petitioners. Essentially, the facts pertinent to the issues before this Court are summarized in the opinion of the Supreme Court of Ohio rendered March 4, 1964. (Petitioners' separate Appendix, pp. 39a-49a.)

For purposes of clarifying petitioners' statement, however, we wish to add the following facts:

Petitioners' amended petition filed on January 24, 1962, sought to enjoin respondents (the Director of Highways of the State of Ohio and the City of Mayfield Heights) from continuing construction of a supplemental storm sewer along Mayfield Road within the City of Mayfield Heights. Subsequent to the Court of Appeals' decree in favor of respondents, construction of the sewer was completed and it was placed in operation during the summer of 1962.

This new storm sewer—supplemental to the Mayfield Road sewer originally built in 1925 by the County of Cuyahoga as part of a county-wide sewer system—was designed to drain a new highway interchange area and to accommodate, by underground sewer drainage, the excess surface water which previously flowed overland down Mayfield Road to Deer Creek on those occasions when the 1925 sewer was, during periods of heavy rainfall, operating at full capacity. For thirty-seven years, from 1925 to the completion of the subject improvement, surface water

from the entire yellow-shaded area in "Defendants' Exhibit B" (R. 755) flowed into Deer Creek through the 1925 sewer and, at times, overland down Mayfield Road.

The following facts were established at trial:

1. The 1925 Mayfield Road sewer, running East from Lander Road to its terminus at Deer Creek, approximately 800 feet East of S.O.M. Center Road, was designed and constructed to drain surface water from the yellow-shaded area on "Defendants' Exhibit B." Included within this area are portions of three watersheds, namely Wilson Mills, Andrews Creek and Deer Creek.

2. Surface water from the Deer Creek watershed naturally drains into Deer Creek and continues to do so now through the Mayfield Road sewers.

3. Upon completion of the Mayfield Road sewer in 1925, surface water from portions of the Wilson Mills and Andrews Creek watersheds, within the yellow-shaded area, was diverted and drained through the facilities of the Mayfield Road sewer, within the boundaries of the City of Mayfield Heights, into Deer Creek, and such diversion continues to the present time.

4. *The actual area from which all of this surface water drains has not been enlarged since 1925.*

From 1925 and particularly since the conclusion of World War II, the population of the City of Mayfield Heights has expanded greatly with a proportionate increase in the number of residential and commercial structures within its corporate limits. As development continued, more of the land surface was rendered impervious to surface water, thus augmenting the coefficient of runoff into the 1925 Mayfield Road sewer. Throughout all of this time, however, the area drained by the 1925 sewer remained constant.

During this period of growth, the 1925 sewer became increasingly inadequate to drain the surface water from heavy rainfall, so that water in excess of the capacity of the sewer would merely flow down the paved surface of Mayfield Road into Deer Creek. In effect, the road itself, between its curbs, acted as an open sewer carrying excess water to Deer Creek.

Early in 1961, the State of Ohio, as part of the interstate defense highway system, began construction of a five million dollar interchange within the City of Mayfield Heights. This is a portion of State Route No. 1 and Interstate 271. Knowledge of the proposed construction existed in the community for several years prior to the filing of this lawsuit. (R. 94, 135.)

In conjunction with this project, the State of Ohio, the Federal Government, and the City of Mayfield Heights determined the necessity of increasing sewer capacity to provide proper and adequate drainage for that portion of the interchange lying within the yellow-shaded area indicated in "Defendants' Exhibit B" and to provide adequate sewer capacity to drain the excess surface water which flowed overland down Mayfield Road into Deer Creek during periods of heavy rainfall.

The 1962 supplemental storm sewer, the subject of this suit, was constructed to meet these needs. This supplemental sewer—designed and constructed by federal, state, and municipal engineers—parallels the existing sewer under Mayfield Road from a point approximately 200 feet West of Golden Gate Boulevard to a terminus at Deer Creek, approximately 800 feet East of S.O.M. Center Road, all within the City of Mayfield Heights.

A few descriptive words of Deer Creek are also pertinent. Having its origin in Mayfield Heights, Deer Creek crosses into the Village of Gates Mills and thence flows

to the Chagrin River through a ravine of varying widths and of depths from approximately fifteen to ninety feet. This ravine is an unimproved wilderness, abundant with scrub and other trees, vines, wild grass and other underbrush, common to such undisturbed and natural woodland areas.

The homes of the abutting petitioners are all located on top of the ravine, and except for one, are situated from fifty to one hundred feet from the edge of the ravine.

Both sewers empty into Deer Creek within the City of Mayfield Heights, at a point approximately 1000 feet from the boundary of Gates Mills, in which village petitioners reside. From the termini of the sewers, Deer Creek flows in a Northeasterly direction through the City of Mayfield Heights into the Village of Gates Mills and thence to the Chagrin River. Over this distance of approximately 8000 feet, the elevation of the stream slopes downward about 350 feet.

Due to its physical characteristics, Deer Creek is in a state known as "super-critical flow." "Super-critical flow" is defined as that condition beyond which any increase in the volume of water in the stream will not change the velocity of the flow of the water. It is a function of the stream bed, shape, and its slope or grade. (R. 481.)

Early in 1950, Worth Munn, one of the petitioners herein, constructed a dirt-fill road across Deer Creek in order to provide access to certain property he was developing. He installed an 84-inch culvert in the streambed to allow for the passage of water. This culvert restricts the capacity of the stream (R. 482) and during excessive rainfall causes Deer Creek to back-up and overflow its channel. This has occurred on two or three occasions between 1955 and 1960. On June 1, 1959, the entire Cuyahoga County area experienced an extraordinary

3.9-inch rainfall in fifty minutes, calculated as in excess of a fifty-year storm. The culvert was completely inadequate to accommodate the waters of Deer Creek and was washed out.

Despite the obvious inadequacy of the culvert, the Village of Gates Mills, a plaintiff in the state courts, reconstructed the culvert (the road having since been dedicated) to its original specifications without consulting professional engineers. (R. 72.)

Relative to petitioners' claims of flooding and consequent damage, it should be noted that there is nothing in the record to support the statements made in the petition. Stripped of exaggerated charges, petitioners are concerned about a few trees and some insignificant erosion. (R. 105, 114, 125, 126, 141, 144.)

Wherever petitioners refer to the capacity of the stream channel in their petition, it should be kept in mind that the reference is to the shallow dry-weather channel. When they say the creek overflows its banks during heavy rain, they mean it flows beyond its shallow dry-weather channel into the normal flood plain.

Petitioners also attempt to create the impression that many storm sewers have been constructed or proposed, all of which will empty into Deer Creek to their damage. The 1925 sewer was the first to carry water into Deer Creek. The 1956 sewer (at Eastgate Shopping Center) was merely the extension of an existing sewer and the culverting of a ditch which already drained surface water into Deer Creek. The storm sewer, the subject of this suit, is nothing but a supplement to the 1925 sewer. The 54-inch oval sewer referred to as having been constructed during trial of the case is merely the culverting of a portion of that part of Deer Creek south of Mayfield Road to its point of origin, thus draining the same area. A second 54-inch oval sewer

—planned, but not yet built—if and when it is constructed, will also drain an area, the surface water of which naturally flows into Deer Creek.

All of the foregoing sewers drain the yellow-shaded area as noted on "Defendants' Exhibit B." This area has not been enlarged since 1925.

ARGUMENT IN OPPOSITION TO THE WRIT.

There are no substantial federal questions raised by this petition for certiorari within the meaning of Rule 19(1)(a) of the rules of this Court, nor are there special or important reasons for granting the writ.

The decision of the Ohio Supreme Court is based solely upon adequate and independent non-federal grounds concerning substantive state law, including questions of *laches, prescriptive rights, surface water rights,* and *riparian rights. The case does not in any way involve questions of eminent domain.*

It is significant to note that all of the cases cited by petitioners on page 12 of their petition concern the law of eminent domain.

No federal questions were decided by the judgment of the Supreme Court nor was it necessary to the determination of the case that any federal questions be decided.

The Supreme Court of Ohio affirmed the finding of the Court of Appeals that petitioners were guilty of laches in seeking to enjoin completion of the sewer. The Court of Appeals specifically found that the officials and residents of the Village of Gates Mills had knowledge of the proposed improvement before construction began for over a two-year period prior to the commencement of this action. Petitioners were also aware that drainage problems were necessarily involved in a project of this magnitude. Their inaction permitted the expenditure of more than

$800,000.00 in tax dollars to be spent on the sewer by the time this action was filed. (Ohio Supreme Court opinion, p. 48a, Petitioners' Appendix.)

Where a decree of a state court rests upon an adequate and independent non-federal ground such as *laches*, this Court will not exercise jurisdiction. *Utler v. City of St. Petersburg*, 292 U. S. 106, 111 (1934); *Wood v. Chesborough*, 228 U. S. 672 (1913); *Preston v. City of Chicago*, 226 U. S. 447 (1913).

Whether one seeking relief is guilty of laches is dependent upon the facts and circumstances of the particular case. In the instant action, the Court of Appeals of Cuyahoga County, after a *de novo* hearing, specifically found that, based upon the evidence, petitioners were guilty of laches. This finding was affirmed by the Supreme Court of Ohio. Assuming, for purposes of argument only, that substantial federal questions exist, the adequate and independent non-federal question of laches is sufficient basis for this Court to deny *certiorari*.

In addition to the issue of laches, the decision of the Ohio Supreme Court was based upon substantive state law concerning surface water rights, riparian rights and prescriptive rights. One of the issues required a decision as to the reciprocal rights and obligations of upper and lower landowners relative to the drainage of surface water within the Deer Creek watershed into the natural watercourse draining that area. The resolution of this question by the Ohio Supreme Court was clearly decided by the application of well-settled principles of local state law. (Ohio Supreme Court opinion, pp. 43a and 44a, Petitioners' Appendix.) This issue does not present any question as to the taking of property without due process of law under either the state or federal constitutions.

Another question before the Ohio Supreme Court was respondents' right, claimed to be acquired by prescription, to drain surface water from portions of the Wilson Mills and Andrews Creek watersheds into Deer Creek. It was found that respondents had so diverted the water from these areas for a number of years in excess of the prescriptive period of twenty-one years, as provided by the laws of the State of Ohio.

The disposition of this issue involved certain questions of fact together with the application of the state law of adverse possession and prescriptive rights. Such a decision will not be reviewed by this Court. *Donahue v. Vosper*, 243 U. S. 59 (1917).

Diversion of water may constitute a cause of action, but this right may be lost after a lapse of time sufficient to confer rights by prescription. The courts of Ohio in the instant case found that prescriptive rights had been acquired.

Extent of the prescriptive rights acquired is again a matter of the application of the applicable local law. (Ohio Supreme Court opinion, pp. 44a-48a, Petitioners' Appendix.)

A decision based upon the local law governing surface water and riparian rights does not present federal questions. *Puget Sound Traction, Light & Power Company v. Newell*, 246 U. S. 649 (1918); *St. Anthony Falls Water Power Company v. Board of Water Commissioners*, 168 U. S. 349, 358, 371 (1897); *Norton v. Whiteside*, 239 U. S. 144 (1915); *Los Angeles Farming & Milling Company v. City of Los Angeles*, 217 U. S. 217, 234 (1910); *Telluride Power Transmission Company v. Rio Grande Western Railway Company*, 187 U. S. 569 (1903); *Green Bay and Mississippi Canal Company v. Patten Paper Company*, 173 U. S. 179 (1898).

CONCLUSION.

Whether petitioners are entitled to the relief they seek—enjoining the construction of a public improvement designed to carry off surface water—is dependent upon certain questions of fact and the application thereto of principles of state law concerning laches, surface water rights, riparian rights and prescriptive rights. In support of their contention that the Ohio Supreme Court did not decide this case in accord with the pronouncements of this Court, petitioners have cited several cases involving eminent domain situations. This approach must fail as the instant case does not involve eminent domain or federal due process questions, but rather calls for the application of principles in other fields of law, none of which remotely raises a federal question.

For this Court to entertain jurisdiction, it must appear that a federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch v. New York*, 293 U. S. 52, 54 (1934). We submit that it was not necessary to the determination of this case that any federal question be decided and that the judgment clearly stands on adequate and independent non-federal grounds.

As the decision of the Ohio Supreme Court is clearly consistent with the established principles of law in these fields and is supported by adequate, substantial and independent non-federal grounds, and as there are no special and important reasons to disturb the disposition of the case, the petition for writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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